91-1865

NO. _____

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1991

RONALD J. QUIROZ
Appellant

VS.

FORT WORTH POLICE CHIEF
THOMAS WINDHAM, et al
Respondents

COPY

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

(1) Is the Petitioner denied the Due Process guaranteed under the United States Constitution when his appeal to the Circuit Court is dismissed for late filing of his brief and the Circuit Court doesn't discuss the applicable Federal Rules of Appellate Procedure (F.R.A.P.) in making its decision to dismiss? (U.S. Constitution, Fifth and Fourteenth Amendments).

(2) Is the Petitioner denied the Equal Protection of the Law guaranteed under the United States Constitution when his appeal to the Circuit Court is dismissed for late filing of his brief and the Circuit Court doesn't discuss the applicable statutory Fereral Rules of Appellate Procedure in making its decision to dismiss? (U.S. Constitution, Fourteenth Amendment).

(3) Does F.R.A.P. Rule 26(c) extend for an additional three days the date for filing a brief when the Petitioner received by the U.S. Postal Service a written order of the Circuit Court granting Petitioner's motion for extension of time to file the brief?

(4) Does F.R.A.P. Rule 25(a) mean that a brief that is mailed by the U.S. Postal Service Overnight Express is deemed filed on the day it is placed in the hands of the U.S. Postal Service?

## LIST OF INTERESTED PERSONS

Petitioner:

RONALD J. QUIROZ of
Fort Worth, Texas

Respondents:

THE CITY OF FORT WORTH, TEXAS
THE POLICE DEPARTMENT OF THE CITY OF FORT WORTH, TEXAS
THOMAS WINDHAM, Police Chief of the City of Fort Worth
RUSSELL BUTLER, Detective for the City of Fort Worth
R.B. WALTERS, Detective for the City of Fort Worth

WEST SIDE STORIES, INC., located in Fort Worth, Texas

MIKE LEWIS of Fort Worth
employee of West Side Stories
PAT LEWIS of Fort Worth
employee of West Side Stories
CRAIG BURKETT of Fort Worth
employee of West Side Stories
THOMAS RAY SCOTT of Fort Worth
employee of West Side Stories

Counsel for Petitioner:

RICK BOWMAN of Fort Worth

Counsel for Respondents:

RICHARD E. HENDERSON of Fort Worth

STEPHEN MAXWELL of Fort Worth

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A. DENIAL OF MOTIONS FOR REHEARING

B. ORDER DISMISSING THE APPEAL

## AUTHORITIES

CASES: PAGE:

Chicago Commodities, Inc. v. Commodities Futures Trading Com.
811 F2d 1262 (9th Cir. 1987) . . . . . 9

Guam Sasaki Corp. v. Diana's Inc.
881 F.2d 713, 716 (9th Cir. 1989) . . . . . 6

Lashley v. Ford Motor Company
518 F2d 749 ( 5th Cir. 1975) . . . . . 8

Prince v. Poulos, 876 F2d 30
(5th Cir. 1989) . . . . . 9

RULES:

F.R.A.P. 25(a) . . . . . 6,8-11
F.R.A.P. 26(c) . . . . . 6-8,11
F.R.A.P. 31(c) . . . . . 3,6

ADVISORY COMMITTEE NOTES:

NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES Concerning F.R.A.P. Rule 25 . . 10

REFERENCES:

Webster's New Collegiate Dictionary (1973) . . . . 10

## RELEVANT ORDERS OR JUDGMENTS

Denial of Motions for Rehearing and Rehearing En Banc to the Fifth Circuit . App. A

Dismissal of Appeal . . . . . App. B

## GROUNDS FOR JURISDICTION

(i) Order of Dismissal: Filed January 24, 1992.

Denial of Rehearing: Filed February 19, 1992.

(ii) The Fifth Circuit's decision dismissing Petitioner's appeal is in conflict with the decision of the Ninth Circuit in Chicago Commodities, Inc. v. Commodities Futures Trading Com., 811 F2d 1262 9th Cir. 1987), and in conflict with its own decision in Prince v. Poulos, 876 F2d 30, (5th Cir. 1989).

## STATUTES AND LAWS

### UNITED STATES CONSTITUTION

Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war, or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment

"Sect. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws."

F R A.P. Rule 25(a) states in pertinent part:

"Papers required or permitted to be filed in a court of appeals shall be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing

shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that "briefs and appendices shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized."

F.R.A.P. Rule 26(c) states:

"Whenever a party is required to do an act within a prescribed period after service of a paper upon that party and the paper is served by mail, 3 days shall be added to the prescribed period."

## STATEMENT OF THE CASE AND MATERIAL FACTS

Ronald Quiroz filed a pro-se complaint on May 2, 1990, complaining of a beating and other actions takenby private citizens by themselves and in concert with members of the Police Department of the City of Fort Worth. Texas occurring on May 7, 1988. (R. 1). An order Granting the Motion for Leave to Amend was signed on October 25, 1990 (R. 50), and Appellant filed an Amended Complaint on October 26, 1990 (R. 67). There was entered into the record an ORDER SETTING SCHEDULE on February 28, 1991 (R. 66), but on March 11, 1991, the trial judge entered a MEMORANDUM OPINION AND ORDER (R.-76-82) and JUDGMENT (R. 83) dismissing the case.

Petitioner filed a Motion for Reconsideration on April 10, 1991 (R. 90), which was denied on April 29, 1991 (R. 102 Petitioner filed his NOTICE OF APPEAL

on May 28, 1991 (R. 103), and filed his Designation of Record on Appeal on June 7, 1991 (R. 105). The record on appeal was transmitted to the Fifth Circuit Court of Appeals by the United States District Court for the Northern District of Texas, on June 27, 1991. Petitioner's Brief was not filed by August 11, 1991, and on August 22, 1991, the panel dismissed Petitioner's Appeal. Before receiving notice of the dismissal, the Petitioner had mailed a request for an extension of time to file his brief on August 23, 1992. Upon receiving notice of the dismissal, Petitioner filed a Motion to Reinstate Appeal and re-submitted his Motion for Extension on August 30, 1991. Petitioner's Motion to Reinstate Appeal was granted on September 18, 1991.

The Petitioner was given until September 20, 1991,to file his Brief. The Petitioner's Brief did not arrive at the Clerk's Office until February 24, 1991.

The Appellees made motion to dismiss the appeal under Rule 31(c) on the grounds that the Brief was filed late. The Motion to Dismiss was granted under Rule 31(c) on the grounds that the Petitioner's Brief was filed too late.

In the Fifth Circuit the Petitioner adopted and repeated the allegations of the Appellee's Motion to Dismiss as being factual. Any comments or additions of Petitioner are placed in italics:

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APPELLEE'S MOTION TO DISMISS

1. As appears from the files of this cause, the record on appeal was transmitted to this Court by the United States District Court for the Northern District of Texas, on June 27, 1991.

2. Under the provisions of Rule 31 (a) of the Federal Rules of Appellant (sic) procedure, Appellant was required to serve and file his Brief within 40 days from the date of filing of the Record

on appeal with this Court, which would have been August 11, 1991. Appellant's Brief was not filed by August 11, 1991. and accordingly, on August 22, 1991, this Honorable Court dismissed Appellant's Appeal. (*Before receiving notice of the dismissal, the Appellant mailed a request for an extension of time on August 23, 1991. Upon receiving notice of the dismissal the Appellant filed a Motion to Reinstate and resubmitted his Motion for Extension of Time to File Appellant's Brief on August 30, 1991).*

3. Thereafter, Appellant filed his Motion to Reinstate Appeal, on or about August 30, 1991. By order of United State's Circuit Judge John M. Duhe', Appellant's Motion to Reinstate Appeal was granted on September 18. 1991; however, Appellant was clearly given and specifically given until September 20, 1991, to file his Brief. *(This extension was granted on September 18. 1991, most probably mailed on*

*September 18, and was received by Appellant on September 20, 1991, a Friday.*)

4. On September 23, 1991, Appellant advised the Clerk of the United States Court of Appeals that his Brief was being filed and copies forwarded to counsel for Appellees. *(Appellant mailed his Brief on September 23, 1991, by U.S. Postal Service Express Mail Next Day Service).* Even if Appellant's assertion that the Brief was being filed on that date was correct, such date still was 3 days after the deadline established by this Court for the filing of said Brief. In fact said Brief was not delivered to counsel for Appellees until September 25, 1991. *(By letter dated September 25, 1991, Appellant explained to the Clerk that there were problems with the company preparing the Record Excerpts and that the Briefs and Excerpts were not actually delivered to the Appellees until that day, instead of the anticipated*

*September 23rd.)*

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(End of Appellee's Motion to Dismiss).

ARGUMENT AND AUTHORITIES

The Fifth Circuit's Order of January 24, 1992, dismissing Petitioner's appeal states in full:

> By **written order** of this Court, appellant was given an Extension until September 20, 1991 to file his brief. The brief was mailed by appellant's counsel on September 23, 1991, and was therefore untimely. See Guam Sasaki Corp. v. Diana's Inc., 881 F.2d 713, 716 (9th Cir. 1989): Fed. R. App. p. 31(c). Although the Clerk's office filed the brief, it must be stricken. Appellee has moved for dismissal of the appeal pursuant to Fed. R. App. P. 31(c), which motion is hereby granted. (Emphasis added).

I.

Guam Sasaki Corp. v. Diana's Inc. is not on point since it concerned the remedy for the failure to file a new briefing schedule after a remand order. In that case there was no attempt whatsoever to file the new briefing schedule. therefore, there could be no discussion of the application of Rules 25 and 26 to a date of filing a brief and how the rules affected the

timeliness as is necessary in the case at bar.

Rule 26(c) states:

Whenever a party is required to do an act within a prescribed period after service of a paper upon that party and the paper is served by mail, 3 days shall be added to the prescribed period.

II.

In this case, the Petitioner received **written notice in the mail** September 20, 1991, that his motion for extension of time was granted, and that the extension was granted **until that same day,** September 20, 1991, a Friday. Petitioner's Brief was not mailed until Monday, September 23, 1991, by US Postal Service Express Mail Next Day Service.

III.

It was, and is, Petitioner's position that his brief was timely filed due to the additional three days allowed by F.R.A.P. Rule 26(c) for responding to an order after that order is servec by mail, i.e., by written order.

The only cases Petitioner has found construing Rule 26(c) are those that point out that the three day extension does not apply to filings and notices of **appeals.** See Lashley v. Ford Motor Company, 518 F2d 749 ( 5th Cir. 1975). There are no cases that Petitioner can find that hold that Rule 26(c) does not mean exactly what it says **when applied to briefs.**

IV.

-------- Application of Rule 25(a) --------

The Petitioner was not able to mail his brief until Monday. September 23, 1991, and did so by mailing via U.S. Postal Service Express Mail Next Day Service.This was not done by Federal Express, UPS, or any other method. It was done by the most **expeditious form of delivery by the U.S. Postal Service.**

V.

Rule 25(a) states in part: "Papers required or permitted to be filed in a court of appeals shall be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing shall not be

timely unless the papers are received by the clerk within the time fixed for filing, **except that briefs and appendices shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail,excepting special delivery, is utilized.**" (Emphasis added).

IV.

The cases that Petitioner has found discussing Rule 25(a) usually concerns filing appeals and notices of appeals late. which is specifically stated to be untimely under the rule. See Chicago Commodities, Inc. v. Commodities Futures Trading Com., 811 F2d 1262 9th Cir. 1987). The Petitioner has found one case directly on point which supports Petitioner's position. In Prince v. Poulos, 876 F2d 30, (5th Cir. 1989), one party moved to dismiss the cause on the grounds that the other party's brief was not timely filed. On page 32 of Prince. in footnote 1, the Court discussed Rule 25(a) as it applies to briefs:

The appellant moved to strike the appellee's brief on the grounds that it was not timely filed. Appellees' brief was due on March 29, 1989. Appellees mailed

their brief via certified registered mail on that date. Rule 25(a) of the Fed.R.App.P. provides that "briefs . . . shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized." The appellant contends that certified mail is not first class. The Post Office disagrees. The appellant further contends that Federal Express, not first class, is the most expeditious form of mail. Webster's defines mail as ". . . letters . . . conveyed under public authority." Webster's New Collegiate Dictionary (1973). Since Federal Express is not a public authority, they are not a form of "mail" and need not be utilized under Rule 25(a). The appellees' brief was timely filed and the appellant's motion to strike is denied. **(Id. p. 32).**

The hardbound volume of U.S.C.A. containing F.R.A.P. Rule 25 also contains "NOTES OF ADVISORY COMMITTEE ON APPELLATE RULES." The 1967 Note states:

The ruling that filing is not timely unless the papers are received within the time allowed is a familiar one. (Citations omitted). An **exception is made in the case of briefs and appendices** in order to afford the parties the maximum time for their preparation. By the terms of the exception, air mail delivery must be used whenever it is the most expeditious manner of delivery." (Emphasis added).

The present day Advisory Committee notes following Rule 25 are unchanged. Therefore, the

Pet tioner points out that his brief should be deemed to have been filed in a timely manner.

CONCLUSION

The Petitioner was notified by written order receivedby U.S. mail that the time for filing the Brief had been extended to September 20, 1991. The (Brief arrived at the Clerk's office on September 24th, after having been mailed in the most expeditious manner on September 23, 1991. Rules 25 and 26 apply to render the Brief timely filed on September 23, 1991.

Petitioner respectfully prays that the petition for certiorari to the United States Court of Appeals for the Fifth Circuit issue.

Respectfully submitted,

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ATTORNEY

CERTIFICATE OF SERVICE

True copies of this Petition for Writ of Certiorari have been mailed, postage paid, to Richard E. Henderson, assistant city attorney with the Office of the City Attorney, City of Fort Worth, 1000 Throckmorton, Fort Worth, Texas, 76102, and to Stephen Maxwell, 108 N. Commerce, Fort Worth, Texas, 76102, on this the 18th day of May, 1992.

_____

DANNY BURNS

RICK BOWMAN

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 91-1598

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RONALD JEROME QUIROZ,
Plaintiff-Appellant,

versus

THOMAS WINDHAM, Ft. Worth Police Chief, ET AL.,
Defendants-Appellees.

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Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

( February 19, 1992 )

Before JONES, DUHE, and WEINER, Circuit Judges.

PER CURIAM:

(X ) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/ DUHE

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UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 91-1598
USDC No. CA-4-90-327E

---

RONALD JEROME QUIROZ,

Plaintiff-Appellant,

versus

THOMAS WINDHAM, Ft. Worth Police Chief, ET AL.,

Defendants-Appellees.

---

Appeal from the United States District Court for the Northern District of Texas

---

Before JONES, DUHE, and WEINER, Circuit Judges.

BY THE COURT:

By written order of this Court, appellant was given an extension until September 20, 1991 to file his brief. The brief was mailed by appellant's counsel on September 23, 1991, and was therefore untimely. See Guam Sasaki Corp. v. Diana's Inc., 881 F.2d 713, 716 (9th Cir. 1989); Fed. R. App. P. 31(c). Although the Clerk's office filed the brief, it must be stricken. Appellee has moved for dismissal pursuant to Fed. R. App. P. 31(c), which motion is hereby granted.

APPEAL DISMISSED. (Filed January 24, 1992)